

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9289 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ASPAKBHAI HAKAMALI SHEIKH

Versus

STATE OF GUJARAT

Appearance:

MR MM TIRMIZI for Petitioner
MR UR BHATT ADDL.GOVERNMENT PLEADER
for Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 19/03/98

ORAL JUDGEMENT

The petitioner, who is arrested and kept under detention, passing the order of detention dt. 26/11/1997 by the Police Commissioner for the City of Ahmedabad, invoking the powers under Sec.3(2) of the Gujarat Anti-Social Activities Act (for short the 'Act'), calls in question the legality and validity of the detention order by preferring this application under Art. 226 of the

Constitution of India.

2. Necessary facts, in order to appreciate the rival contentions, may, in short, be stated. Against the petitioner, about four complaints came to be lodged with Vatva, Sarkhej, Odhav and Dani Limda Police Stations. It is alleged in the complaint lodged with the Vatva Police Station that the petitioner committed the theft, trespassing into the premises. He took away pipes, drill machine and weighing scales, the value of which is assessed at Rs.69,700/-. He also committed likewise theft of roller and wrapped round bundles, Trolly, two coaches and Kampo, the value of which is assessed at Rs.1,73,300/-. The complaint in that regard is lodged with Sarkhej Police Station. As alleged in the complaint lodged with Odhav Police Station, the petitioner committed the theft of iron bars and Essar Motor Car, the value of which is assessed at Rs.10,000/-. What is alleged in the complaint lodged with Dani Limda Police Station is that the petitioner committed the theft of pipes and rings, the value of which is assessed at Rs.24,200/-. The Police Commissioner, having come to know about such complaints, made detailed inquiry. After inquisition, the Police Commissioner could come to know that the petitioner is a head-strong person and by his criminal subversive activities, he is terrorising the people, and shattering & battering the public order. The petitioner was not only committing the offence of theft, but also extorting money from the public causing injuries to the person and damaging the properties. He, in order to carry out his nefarious activities smoothly, was using the force and asked others to help him. He used to cause the people to bend his way and those who resisted, were harassed, and treated brutally. As anti-social activities disturbing the public order and spreading pandemonium were going berserk, no one was, therefore, willing to come forward and state against him. After a great persuasion and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. From the statements and other inquiries, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the people, and upsetting the public order & leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him passing the order under the Act as the action under general law was found to be unproductive. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested, and at

present, is in custody.

3. The petitioner has challenged the order on several grounds, but at the time of submission, when query was made to the learned advocate representing the petitioner, tapered off his submissions, confining to the only ground namely exercise of privilege under Sec.9(2) of the Act. According to him, without any just cause, the privilege was exercised, and particulars about witnesses were suppressed, as a result, the petitioner, for want of necessary particulars, could not make effective representation, and his right in that regard was jeopardised. The detention is, therefore, bad in law.

4. Mr. U.R.Bhatt, learned APP in reply submitted that the authority passing the order had considered all the relevant factors and materials produced before him. After careful study, when he was fully satisfied, he thought it fit to exercise the privilege not to disclose the necessary particulars about the witnesses so as to protect their safety. When in the public interest, the privilege was exercised, the order passed was quite in consonance with law. All relevant paper with full details were supplied to the petitioner. His no right has been injured. With a view to have the order of his choice, the petitioner was unnecessarily making hue & cry qua privilege. As both have confined to the only point about exercise of the privilege, I will deal with the same and no other grounds.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of

non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was

absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. He had therefore considered every necessary particulars placed before him and antecedent of the petitioner as well. He was then fully satisfied that the fear expressed by the witnesses, was not imaginary but to say genuine and to protect their lives, particulars were required to be withheld. No doubt, Mr. J.R.Rajput, Under Secretary to the Govt. of Gujarat has filed his affidavit explaining certain facts and governing factors but has shrewdly avoided to state about exercise of privilege u/s. 9(2) of the Act. It is not stated what materials he considered, how and what type of inquiry he made and whether he was by application of mind subjectively satisfied that the fear expressed by the witnesses qua disclosure of their names, addresses and occupation to the petitioner, was neither ill-based nor imaginary or empty excuse but it required anxious consideration, and to safe-guard their safety, i.e. in public interest the particulars about witnesses were required to be suppressed. It appears that the authority passing the order had assigned the task of inquiry about fear expressed by the witnesses to other Police Officer and whatever that Police Officer reported, the detaining authority, without applying his mind, accepted the same reposing full trust and exercised the privilege. When for no good cause, explanation is withheld, the case about exercise of privilege cannot be viewed with favour, but adverse inference has to be drawn. It can, therefore, well be said that without application of mind, the authority mechanically accepted the report of his subordinate which is not in consonance with law. Consequently, the subjective satisfaction is vitiated. Hence the detention cannot be held legal and maintainable. In the result, the order of detention and continued detention must be held to be unconstitutional and illegal.

5. For the aforesaid reason, this application is allowed. The order of detention dt. 26/11/1997 passed by the Police Commissioner for the City of Ahmedabad, being unconstitutional and illegal, is hereby quashed and set aside. The petitioner is ordered to be set at liberty, forthwith, if no longer required in any other case. Rule accordingly made absolute.

Date:19/3/1998. ----
(ccs)